LEE TING SANG

v.

CHUNG CHI KEUNG & ANOR.

COURT OF APPEAL, HONG KONG
LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD GRIFFITHS
LORD GOFF OF CHIEVELEY
LORD LOWRY
[PRIVY COUNCIL APPEAL NO. 44 OF 1989]
8 MARCH 1990

LABOUR LAW: *Injury at work - Contract of employment - Whether contract of service or contract for services - Injured person a mason - Whether an "employee" under contract of employment or an independent contractor - Employees' Compensation Ordinance (Cap. 282).*

CIVIL PROCEDURE: *Test to determine whether appellant was working as an employee or independent contractors - Question of fact for trial Judge - Concurrent findings of fact by trial Court and Court of Appeal - Whether there was error of law in the assessment of the facts - Whether conclusions of trial Court and Court of Appeal could reasonably be entertained - Principles upon which setting aside of concurrent findings of fact will be justified.*

The appellant worked as a mason and the 1st and 2nd respondents were subcontractor and main contractor respectively at the construction site. The appellant worked for the 1st respondent and was injured during the course of his work. The accepted facts were that the appellant suffered a head injury whilst working as a mason chiselling concrete at the construction site. He was told to work at the site by the 1st respondent who also gave him a plan showing him where to chisel but was not thereafter supervised in his work. The foreman of the 2nd respondent did, however, from time to time check the work. The tools were provided by the 1st respondent and he was normally paid in accordance with the amount of concrete chiselled. When he completed his work before 5.00 p.m. he would assist the 1st respondent to sharpen chisels for which he would be paid on an hourly basis. The trial Judge found as a fact that the appellant was working as an independent contractor when he sustained the injury. His appeal was dismissed by the Court of Appeal.

Held:

[1] The fundamental test in determining whether a person was employed under a contract for services or contract of service is "whether the person who was engaged himself to perform these services is performing them as a person in business on his own account?"

[2] On the facts of this case, all the tests or indicia point towards the status of an employee rather than an independent contractor.

[3] The question of whether or not the work was performed in the capacity of an employee or as an independent contractor is to be regarded by an appellate Court as a question of fact to be determined by the trial Court.

[4] The trial Judge applied the dicta from two cases of a wholly dissimilar character which may have misled the Court in its assessment of the facts of this case and this amounts to an error of law justifying setting aside what are to be regarded as concurrent findings of fact by the trial Court and Court of Appeal.

[5] As the facts of this case points so clearly to the existence of a contract of service, the finding by the trial Judge that the appellant was working as an independent contractor was, a view of the facts which could not reasonably be entertained and is to be regarded as an error of law.

[Advise to Her Majesty: Appeal allowed with costs in the Privy Council and Courts below and costs for assessment of compensation to be paid by respondents. Care remitted to Court of Appeal for assessment of compensation by Court of Appeal or District Court.]

Cases referred to:
Market Investigations v. Minister of Social Security [1969] 2 QB 173
Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy [1946] AC 508
Davies v. Presbyterian Church of Wales [1986] 1 WLR 323
Smith v. General Motor Cab Company [1911] AC 188
Bobbey v. Crosbie [1915] 114 LT 244
Easdown v. Cobb [1940] 1 All ER 49
O'Kelly v. Trusthouse Forte [1984] QB 90
Edwards v. Bairstow [1956] AC 14
Cooper v. Stubbs [1925] 2 KB 753
Stevenson Jordan & Harrison Ltd. v. MacDonald & Evans [1952] 1 TLR 101 CA
Bank voor Handel en Scheepvaart N.V. v. Slatford [1953] 1 QB 248

Legislation referred to:
Copyright Act 1911 [UK], s. 5(1)
Employees' Compensation Ordinance (Cap 282) [HK], ss. 2, 11(7)

Other sources referred to:
Hong Kong Law Journal [1972], Vol. 2, No. 2 p. 150

JUDGMENT

Lord Griffiths:

The first respondent is a building sub-contractor who was at the material time executing a sub-contract on behalf of the second respondent who were the main contractors upon a construction site at the Shan King Estate in Hong Kong. The appellant is a mason who was working for the first respondent upon the sub-contract. During the course of his work the appellant fell from a high stool and suffered injury. The question raised by this appeal is whether the provisions of the Employees' Compensation Ordinance (Cap. 282) entitled the appellant to be compensated for his jury by the respondents.

The Ordinance is clearly modelled upon the English Workmen's Compensation Acts and provides for compensation to be payable to an employee in respect of an accident arising out of, and in the course of, his employment. An employment is defined in s. 2 as "any person who has ... entered into or works under a contract of service or apprenticeship with an employer in any employment". The definition of employee includes casual workers (see s. 2 proviso (b) and also employees who have entered into concurrent contracts of service with two or more employers (see s. 11(7)).

The respondents resisted the appellant's claim for compensation upon the ground that he was not working for the first respondent as an employee but had been engaged to carry out the work as an independent contractor. At the hearing before the District Judge the appellant gave evidence in which he explained the nature of his work and the terms of his engagement. The respondents called no evidence.

The District Judge held that the appellant was working as an independent contractor and therefore dismissed his claim for compensation. The Court of Appeal dismissed the appellant's appeal. The appellant now appeals upon the ground that he was at the material time working as an employee of the first respondent within the meaning of the Ordinance.

In opening the appeal Bennett invited their Lordships to apply a purposive construction of the Ordinance which, he submitted, was clearly intended to give a wide measure of protection to workers in the building and construction industry and to provide compensation for those who would not ordinarily be expected to have taken out their own insurance against the risk of accidental injury. Their Lordships have had the advantage of reading the article by Mr. John Rear in the *Hong Kong Law Journal* [1972] (Vol. 2, No. 2 p. 150) entitled "Self-employment in the Building Industry" referred to by both the Judge and the Court of Appeal and fully appreciate that the construction industry in Hong Kong relies upon a large pool of casual labour employed upon a job-by-job basis and further appreciate that the present appeal may set a precedent against which the status of many of those employed in the building industry may be judged in the future. Nevertheless, their Lordships cannot accede to a submission to adopt a different approach to the construction of a "contract of service" in this Ordinance from that adopted in the English Workmen's Compensation Acts upon which it is so clearly based and also, in those other statutes dealing with employment law in which the phrase often appears. The question is to be answered by applying English common law standards to determine whether the workman was working as an employee or as an independent contractor.

What then is the standard to apply? This has proved to be a most elusive question and despite a plethora of authorities the Court have not been able to devise a single test that will conclusively point to the distinction in all cases. Their Lordship agree with the Court of Appeal when they said that the matter had never been better put than by Cooke J at pp. 184 and 185 in *Market Investigations v. Minister of Social Security* [1969] 2 QB 173:

> The fundamental test to be applied is this:
>
> Is the person who has engaged himself to perform these services performing them as a person in business on his own account?
>
> If the answer to that question is 'Yes', then the contract is a contract for services. If the answer is 'No', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the consideration which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he was an opportunity of profiting from sound management in the performance of his task.

With this test in mind it is now necessary to turn to the facts of the present case which are summarised in the following passage from the judgment of the Court of Appeal:

> Although there as no finding in express terms, it seems clear, that the trial Judge accepted the facts sworn to by the applicant. These facts established:
>
> 1. that the applicant suffered a head injury in an accident when working as a mason chiselling concrete at the said construction site;
> 2. that he had been told to work at the site by the 1st respondent who was a sub-contractor of the 2nd respondent;
> 3. that the applicant was given a plan by the 1st respondent showing him where to chisel but he was not thereafter supervised in his work. (The foreman of the main contractor, the 2nd respondent did, however, from time to time check the work).
> 4. that the tools used by the applicant were provided by the 1st respondent;
> 5. that he had commenced to work at the site some 20 days prior to the accident;
> 6. that he was normally paid in accordance with the amount of concrete chiselled, the measurement being done by the 1st respondent or his agent, but that on occasions, when the concrete was difficult to chisel or the work involved only a small area, he received a wage of $220 for an 8 a.m. to 5 p.m. day. (This appears to have been done because the payment if calculated in accordance with the area chiselled would have amounted to less than a fair day's wage.)
> 7. that the applicant when he completed his work before 5 p.m. would assist the 1st respondent to sharpen chisels and would, after so doing, be paid for that work on an hourly basis.
> 8. that the applicant worked from time to time for other contractors but would, when the work of the 1st respondent was urgent, give priority to him, telling any other employer for whom he was then working to engage another to finish the work.

The District Judge accepted a submission on behalf of the respondents that the hours worked by the appellant from 8.00 a.m. to 5.00 p.m. were not worked on a strict basis but the appellant just followed other workers at the site as a matter of convenience. As the Court of Appeal observed, this submission appeared to rely on speculation rather than evidence and was inconsistent with the uncontradicted evidence of the appellant that he would be sacked if he disappeared from the site. This accords with the common sense of the matter for if the appellant was free to come and go at will it is difficult to see how the first respondent could carry out timeous performance of his sub-contract.

Upon these findings of fact their Lordships would have had no hesitation, if sitting as a Court of first instance, in concluding that the appellant was working for the respondent as an employee and not as an independent contractor. All the test, or perhaps it is better to call them indicia, mentioned by Cooke J point towards the status of an employee rather than an independent contractor. The appellant did not provide his own equipment, the equipment was provided by his employer. He did not hire his own helpers; this emerged with clarity in his evidence when he explained that he gave priority to the first respondent's work and if asked by the first respondent to do an urgent job he would tell those he was working for that they would have to employ someone else; if he was an independent contractor in business on his own account, one would expect that he would attempt to keep both contracts by hiring others to fulfil the contract he had to leave. He had no responsibility for investment in, or management of, the work on the construction site, he simply turned up for work and chipped off concrete to the required depth upon the beams indicated to him on a plan by

the first respondent. There is no suggestion in the evidence that he priced the job which is normally a feature of the business approach of a sub-contractor; he was paid either a piece-work rate or a daily rate according to the nature of the work he was doing. It is true that he was not supervised in his work, but this is not surprising, he was skilled man and he had been told the beams upon which he was to work and the depth to which they were to be cut and his work was measured to see that he achieved that result. There was no question of his being called upon to exercise any skill or judgment as to which beams required chipping or as to the depths that they were to be cut. He was simply told what to do and left to get on with it as, for example, would a skilled turner on a lathe who was required to cut a piece of metal to certain dimensions.

Taking all the foregoing considerations into account the picture emerges of a skilled artisan earning his living by working for more than one employer as an employee and not as a small business-man venturing into business on his own account as an independent contractor with all its attendant risks. The appellant ran no risk whatever save that of being unable to find employment which is, of course, a risk faced by all employees. In particular, it is a risk faced by casual employees who move from one job to another, and such casual employees are specifically covered by the Ordinance.

Nevertheless, despite the strong impression that the evidence created in the minds of their Lordships, Goldsmith, in a conspicuously able argument on behalf of the respondents, submitted that the board were faced in this appeal with concurrent findings of fact by the District Judge and the Court of Appeal from which the board should not depart in accordance with the principles established in *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* [1946] AC 508.

Whether or not a person is employed under a contract of service is often said in the authorities to be a mixed question of fact and law. Exceptionally, if the relationship is dependent solely upon the true construction of a written document it is regarded as a question of law: see *Davies v. Presbyterian Church of Wales* [1986] 1 WLR 323. But where, as in the present case, the relationship has to be determined by an investigation and evaluation of the factual circumstances in which the work is performed, it must now be taken to be firmly established that the question of whether or not the work was performed in the capacity of an employee or as an independent contractor is to be regarded by an appellate Court as a question of fact to be determined by the trial Court.

At first sight it seems rather strange that this should be so, for whether or not a certain set of fact should be classified under one legal head rather than another would appear to be a question of law. However, no doubt because of the difficulty of devising a conclusive test to resolve the question and the threat of the appellate Courts being crushed by the weight of appeals if the many borderline cases were considered to be questions of law, it was held in a series of decisions in the Court of Appeal and in the House of Lords under the English Workmen's Compensation Acts that a finding by a county Court Judge that a workman was, or was not, employed under a contract of service was a question of fact with which an appellate Court could only interfere if there was no evidence to support his finding: see *Smith v. General Motor Cab Company* [1911] AC 188, *Bobbey v. Crosbie* [1915] 114 LT 244 and *Easdown v. Cobb* [1940] 1 All ER 49. More recently in *O'Kelly v. Trusthouse Forte* [1984] QB 90 the Court of Appeal, despite a powerful dissenting judgment by Ackner LJ, held that whether or not a waiter was employed under a contract of employment within the meaning of the Employment Protection (Consolidation) Act 1978 was a question of mixed fact and law, and that the finding of an industrial tribunal on this issue, from which an appeal lay on a point of law only, could only be impugned if it could be shown that the

tribunal correctly directing itself on the law could not reasonably have reached the conclusion under appeal. Lord Donaldson pointed out that this was a heavy burden on an appellant and concluded by saying "I would have thought that all this was trite law, but if it is not, it is set out with the greatest possible clarity in *Edwards v. Bairstow* [1956] AC 14.

In *Edwards v. Bairstow* the question that fell to be decided was whether the General Commissioners were right in their finding that the respondents had not entered into "an adventure in the nature of trade". Whether or not persons have entered into "an adventure in the nature of trade" is a decision of a like nature to whether or not a person is employed under a contract of service or, to state the question in modern language, under a contract of employment. The decision will depend upon the evaluation of many facts and there will be many borderline cases in which similarly instructed minds may come to different conclusions. It is in such situations that an appeallate Court must not interfere and it is in this sense that the decision is said to be one of fact. But an appellate Court must not abdicate its responsibility and it is worth bearing in mind the words with which Lord Radcliffe concluded his speech in *Edwards v. Bairstow* at pp. 38 and 39:

> I think it possible that the English Courts have been led to be rather over-ready to treat these questions as 'pure questions of 'fact' by some observations of Warrington and Atkin LJJ in *Cooper v. Stubbs* [1925] 2 KB 753. If so, I would say, with very great respect, that I think it a pity that such a tendency should persist. As I see it, the reason why the Courts do not interfere with commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up the commissioners are the first tribunal to try an appeal, and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The Court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the subjects that commissioners deal with or to invite the Courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado.

In arriving at his conclusion the District Judge relied upon two dicta of Denning LJ which, whilst no doubt of value in the determination of the cases in which they were spoken, would appear to have little relevance to the facts of the present case and if misapplied may have led to an erroneous conclusion. The Judge said:

> ... I find that the contract between the 2 parties was more consistent with a contract for service than a contract of service. From the totality of evidence, Mr. Lee was not employed as part of the business of Mr. Chung but rather as a contract for service and his work, although done for the business, is not integrated into it but is only accessory to it (see *Stevenson Jordan & Harrison Ltd. v. MacDonald & Evans* [1952] 1 TLR 101 CA per Denning LJ (as he then was) at p. 111).

The facts in *Stevenson Jordan & Harrison Ltd. v. Macdonald & Evans* were as follows: The plaintiffs had employed Evans-Hemming as an engineer. After his employment ended Evans-Hemming produced a book of lectures based upon his experience with the plaintiffs. He purported to assign the copyright in the book to the defendants. The plaintiffs brought proceedings to restrain publication of the book upon the grounds (1) that the book infringed their confidential information and (2) that the copyright in the book belonged to them and not to Evans-Hemming. The first ground failed. The second ground was based upon s. 5(1) of the Copyright Act 1911 which provides that:

> Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein: Provided that ... (b) where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright.

The question to be determined in the appeal was stated by Sir Raymond Evershed MR at p. 102:

> The Court has, therefore, to determine what was the nature of the employment of Mr. Evans-Hemming by the plaintiffs and whether the book (or, if not the whole book, what part of it) was within para. (b) so that the copyright in the work belonged to the plaintiff company.

Some of the lectures had been written after the employment had terminated and naturally the Court held that the copyright of that part belonged to Mr. Evans-Hemming. Other lectures were written whilst he was employed by the plaintiffs but were written and delivered as public lectures to universities and learned societies and again the Court held the copyright was in Evans-Hemming. However, some lectures were based upon a specific assignment to produce an instruction manual on behalf of clients of the plaintiffs who had their business in Manchester (the Manchester section). The Court held the copyright in this part of the book belonged to the employers.

It was to distinguish between the university lectures and the Manchester section that Lord Denning proposed the test quoted by the Judge and he applied it in the following passage at p. 111:

> In so far as Mr. Evans-Hemming prepared and wrote manuals for the use of a particular client of the company, he was doing it as part of his work as a servant of the company under a contract of service; but in so far as he prepared and wrote lectures for delivery to universities and to learned and professional societies, he was doing so as an accessory to the contract of service and not as part of it. The giving of lectures was no doubt very helpful to the company, in that it might serve directly as an advertisement for the company, and on that account the company paid Mr. Evans-Hemming the expenses he incurred. The lectures were, in a sense, part of the services rendered by Mr. Evans-Hemming for the benefit of the company. But they were in no sense part of his service. It follows that the copyright in the lectures was in Mr. Evans-Hemming.

The appellant's work in this case was clearly not accessory to the first respondent's business, in the sense used by Denning LJ. The appellant was carrying out the very work that the first respondent in his business as a sub-contractor had undertaken to perform for the head contractor. The appellant's work was not accessory to the respondent's business but integral to it. Properly understood the test points in the present case towards rather than against the finding of a contract of service.

The District Judge relied upon the second *dictum* of Lord Denning in the following passage:

> Further, there is no evidence that Mr. Lee is part and parcel of the organisation as observed again by Denning LJ in *Bank voor Handel en Scheepvaart NV v. Slatford* [1953] 1 QB 248 at p. 295.

And the Court of Appeal endorsed the Judge's use of that case when they said:

> We are further satisfied that the trial Judge was right to find, as he did, that the applicant was not part and parcel of the organisation of the 1st respondent.

In *Bank voor Handel en Scheepvaart NV v. Slatford* the issue was whether, when the custodian of enemy property invests money in his hands, he is liable to pay tax upon it, an issue which could scarcely be more far removed from that which has to be considered in

this appeal. The passage relied upon by both the Judge and the Court of Appeal appears in a part of the judgment of Denning LJ in which he is discussing the nature of Crown status. It is perhaps as well to see it in its full context. Denning LJ said at p. 295:

> So far as Crown status is concerned, the Privy Council found no guidance in the phrase 'emanation of the Crown'. Devlin J finds none in the phrase 'servant or agent of the Crown', although it is the phrase used in the Crown Proceedings Act 1947. I find no guidance in the phrase 'Crown status' by itself. All that can be said is that Crown status attaches to the Ministers of the Crown, to the Government Departments of which they are heads, and to the servants of those departments. In this connection I would observe that the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation: see *Cassidy v. Ministry of Health* [1951] 2 KB 343 and *Stevenson Jordan & Harrison Limited v. MacDonald & Evans* [1951] 1 TLR 101.

As can be seen from the context the remark is obiter and apparently inserted to emphasise the fact that persons working in a professional capacity, such as doctors or engineers, may in law be "servants" although their employer would not be expected to order the manner in which they exercise their professional skills. But to apply the test of whether a person is "part and parcel of the organisation" is likely to be misleading in the context of a statute which expressly contemplates that casual workers and workers working for two or more employers concurrently may be employed under a contract of service. In the building and construction industry the test may lead to the error of only considering those on the permanent staff as employed under a contract of service and thus excluding all those from the protection of this Ordinance who are taken on for a particular project because, not being on the permanent staff, they are not "part and parcel of the organisation". It is perhaps not without significance that neither the Judge nor the Court of Appeal referred to the provisions in the Ordinance covering casual workers and those who work for more than one employer.

Their Lordships conclude that reliance upon these two *dicta* cullied from cases of a wholly dissimilar character, may have misled the Courts below in their assessment of the facts of this case and amount in the circumstances to an error of law justifying setting aside what are to be regarded as concurrent findings of fact.

Their Lordships are further of the opinion that the facts of the present case point so clearly to the existence of a contract of service that the finding that the appellant was working as an independent contractor was, to quote the words of Lord Simonds in *Edwards v. Bairstow* (at p. 29), "a view of the facts which could not reasonably be entertained" and is to be regarded as an error of law.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be allowed and the case remitted to the Court of Appeal for assessment of the compensation by that Court, or the District Court, as the Court of Appeal sees fit. The respondents must pay the appellant's costs in the Courts below, before their Lordships' Board and of the assessment of the compensation.

Also found at [1990] 1 CLJ 1066